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No.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

M. R. YUDOFISKY & ASSOCIATES, a Ken-
tucky Partnership, and
LOUIS COHEN, Unmarried,
EDWIN COHEN and **HELEN COHEN**, His
Wife Petitioners

versus

COMMONWEALTH OF KENTUCKY, DE-
PARTMENT OF FINANCE . . . Respondent

On Petition for a Writ of Certiorari to the
Court of Appeals of Kentucky

BRIEF FOR RESPONDENT IN OPPOSITION

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M. R. YUDOFKY & ASSOCIATES, a Ken-
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LOUIS COHEN, Unmarried,
EDWIN COHEN and HELEN COHEN, His
Wife - - - - - - *Petitioners*

v.

COMMONWEALTH OF KENTUCKY, DEPART-
MENT OF FINANCE - - - - *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

As set out in Petitioners' Appendix, pages 23-51.

JURISDICTION

Petitioners assert jurisdiction pursuant to 28 USC 1257. Respondent denies that jurisdiction is properly laid in this Court and denies that a substantial federal or constitutional issue is involved.

CONSTITUTIONAL PROVISIONS ASSERTED

Petitioners assert the application of the Fifth Amendment and the Fourteenth Amendment. Respondent denies their applicability.

STATEMENT OF THE CASE AND FACTS

The Petitioners in their Statement of the Case have injected as much argument as a recitation of the salient facts of this case such as to render it unacceptable as an accurate reflection of the chronological history of this dispute. However, the trial court in one of the consolidated actions, 79-CI-01266, adopted the Findings of Fact and Conclusions of Law rendered by Judge Richard A. Revell in a parallel case involving the identical parties, issues and public project as before this Court in these cases consolidated on appeal.* Judge Revell in his Findings of Fact and Conclusions of Law has detailed a concise, unbiased account of the pertinent facts of this case and the Respondent directs the Court to Petitioners' Appendix, pages 35-46, for review of Judge Revell's account of these cases. Upon agreement of counsel the evidence heard by Judge Revell in the parallel case was submitted to the trial judges in the consolidated actions involved in the case at bar. Both trial judges affirmed the Respondent's right to condemn in each case. The only facts that should be added to Judge Revell's account is that the Kentucky Court of Appeals affirmed the trial court on September 24, 1982 and the Kentucky Supreme Court denied the Petitioners' Motion for Discretionary Review on November 17, 1982.

*NOTE: The United States Supreme Court denied certiorari on these former cases on October 4, 1982. (See M. R. Yudofsky & Associates, et al. v. Kentucky Department of Finance, No. 81-2186.)

REASONS FOR DENYING THE WRIT

The thrust of the Petitioners' argument and their claim of federal jurisdiction lies in their unfounded belief that they have been denied "due process of law" as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. Despite the Petitioners' laudible attempts at federal jurisdiction on the above basis, even the most cursory of glances at the record in this case completely disputes their contentions.

In simplest terms this action is a routine state condemnation case filed by the Respondent against the Petitioners in state court pursuant to the statutory authority of Kentucky Revised Statutes 416.570 to 416.660 wherein the Petitioners' land was needed as part of a public improvement in Louisville, Jefferson County, Kentucky. The Petitioners, as is their right under these statutes (KRS 416.660), filed an Answer to the condemnation petition contesting the Respondent's right to take their property. Upon consideration of the Petitioners' answer a hearing was held on the sole question of the Respondent's right to take the Petitioners' property. The hearing on this one question involved three days of testimony and the receipt of over forty exhibits by the Court. The trial judge who presided over this hearing (Judge Revell) rendered an eleven page Findings of Fact and Conclusions of Law painstakingly detailing the issues and arguments of the parties and ruling that the project

in question was for a public purpose and that the Respondent had the right to condemn.

The Petitioners then availed themselves of their constitutional right to appeal this decision to the Kentucky Court of Appeals. They presented their arguments both orally and by brief to that Court. After a review of the record and upon hearing arguments of counsel, the Court of Appeals rejected the Petitioners' contentions stating that the facts in the two cases now before them were identical "to those considered in actions 80-CA-230 and 81-CA-537 heretofore decided by this Court. The only difference is that here other lots adjoining those involved in the prior decision are involved."*

The Kentucky Court of Appeals when affirming the previous cases involving these identical parties and issues succinctly addressed and disposed of the issues at bar when it stated:

It seems obvious that a parking garage to serve state-owned facilities as well as the general public is, indeed a public use. *Miller v. City of Georgetown, Ky.*, 191 S. W. 2d 403 (1945). Nor is it fatal that some property will benefit more than others. *Sturgill v. Commonwealth, Department of Highways, Ky.*, 384 S. W. 2d 89 (1964). See Respondent's Appendix, pages 1-5.

Not satisfied with these affirmations of the Respondent's right to condemn, the Petitioners sought

*See Kentucky Court of Appeals decision, Petitioners' Appendix, page 26.

review by the Supreme Court of Kentucky. Their Motion for Discretionary Review by the Supreme Court of Kentucky was denied by that Court without comment indicating to the Respondent that the Kentucky Supreme Court found no merit in the Petitioners' claims nor found the Kentucky law so onerous that it needed review and alteration.

Where in the record is there the denial of due process which the Petitioners claim is an affront to the United States Constitution? The Petitioners received an exhaustive three-day trial on the singular question of the Respondent's right to condemn their property. They were allowed to call any and all witnesses they desired and introduce whatever proof they deemed necessary to support their position. They submitted briefs and made their arguments to the trial court and the Kentucky appellate court without success. It is obvious to the Respondent that from copies of the trial courts' decisions and of the Kentucky Court of Appeals' affirmation of those decisions that the Kentucky courts gave the Petitioners their "day in court." The Petitioners' real complaint is not with the manner or form of their treatment in the Kentucky courts, not a question of denial of due process at all, but rather the same sad litany of most losers in the adversary system—a cry of foul because the final decision goes against them.

Although the Respondent believes the record on its face completely negates the Petitioners' claim of a denial of due process, the Respondent feels it appro-

priate to comment briefly on the Petitioners' various arguments for review of this case. Petitioners claim the trial court erred when it "thought that KRS 247.140(2), Functions of Fair Board, created a presumption in favor of the condemnor's decision:" (See Petitioners' Brief, page 20). Contrary to Petitioners' assertions this Respondent does not read in the trial court's findings any such presumptions. What this Respondent sees in the trial court's findings is that after three days of trial the trial court found, not presumed, that the project in question was for a public purpose. If the trial court cited highway condemnation decisions as supportive of its findings this Court should not find that unusual as highway cases make up the bulk of eminent domain decisions in the Commonwealth of Kentucky.

The Petitioners argue that somehow the Respondent delegated its sovereign powers to a private individual and that this delegation constitutes a denial of due process to them. The trial court upon reviewing all of the evidence found no merit in this argument. The trial judge, as the trier of fact, upon weighing the proof before him exercised that cherished discretion of a trier of fact, whether judge or jury, and found against the Petitioners' arguments. Is this Court or any appellate court ready to substitute its judgment for that of the trier of fact absent fraud or gross abuse of discretion? The Respondent thinks not!

Petitioners further argue that the Kentucky courts failed to follow an Illinois state court decision in de-

ciding this Kentucky case. The Petitioners claim that the case of *Reel v. City of Freeport, Ill.*, 209 N. E. 2d 675 (1965) is "on all fours" with the case at bar. However, the truth is that the *Reel* case has absolutely no logical relationship to this case. First, an Illinois authority has no bearing on a Kentucky condemnation case. Nevertheless, the case is easily distinguished from this one because the parking garage that was to be built in the Illinois case was for the sole benefit of a department store. The sole beneficiaries of the parking garage in this action will be the Commonwealth Convention Center and the new State Office Building. In the Illinois case, the City of Freeport was by contract to sell their existing parking garage to Montgomery Ward and to condemn for a new city parking garage. Herein, no such arrangements are contemplated nor is any private individual being facilitated. Any parallels that could possibly be drawn between these two cases are necessarily strained.

In the *Reel* case, the complaint is that Reel did not "get his day in court" because the Circuit Court dismissed his claim. Herein, the Petitioners did have their day in court, therefore the case is wholly inapplicable to the case at bar. Why the final outcome of the *Reel* case is not given by the Petitioners is that the issue at bar was not before that Court.

The Petitioners' other arguments are but repetitions of their earlier arguments concerning the public use or character of the project in question. It is the Respondent's belief that the trier of fact is in the best

position to view the evidence and apply the appropriate law. In Kentucky, pursuant to statute, the trial court is given the authority to determine the legitimacy of a condemnor's right to condemn private property. (KRS 416.610). The Petitioners were given every opportunity to contest the nature and motive of the purported private project, but failed to present significant proof to convince the courts of their position. There has been no denial of due process here, but only the continued and unmerited assaults of a defeated adversary. The Respondent believes this dispute was best described by Judge Revell the trial judge in the parallel case previously reviewed by this Court and by the Kentucky courts when he stated in the last paragraph of his Conclusions of Law:

While the defendant, faced with the loss of its land, understandably looks for and sees through its eyes a surreptitious deal, this court, sees only the exercise of good business judgment. In any event, the proposed parking garage is a legitimate governmental purpose, is to be operated and maintained by the Commonwealth for the use of the general public, and hence the Commonwealth has by virtue of eminent domain the right to acquire the subject property, and the Commonwealth is entitled to immediate possession. (See Petitioners' Appendix, page 45.)

CONCLUSION

The Respondent submits that the record herein clearly reflects no denial of due process and, thus, no constitutional issue is presented. Therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Henry C. Germann, counsel for Respondent, hereby certify that the attached Respondent's Brief in Opposition was served on Petitioners by depositing copies of the aforementioned document in the United States mail first-class postage prepaid, on the 1 day of March, 1983, addressed to Petitioners' counsel, Edwin L. Cohen, Cohen & Cohen, 335 West Market Street, Louisville, Kentucky 40202.



HENRY C. GERMANN

*Attorney for Respondent
Member, Bar of the Supreme
Court of the United States*

OPINION RENDERED: SEPTEMBER 4, 1981; 2:00 P.M.
NOT TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY COURT OF APPEALS

No. 80-CA-230-MR

M. R. YUDOFKY & ASSOCIATES

A Kentucky Partnership - - - Appellant

v.

COMMONWEALTH OF KENTUCKY,

DEPARTMENT OF FINANCE,

CLIFFORD A. HARROD, D/B/A

DECANTER BAR,

RUDY F. BOUTELLER and

LOUELLA PERSON - - - Appellees

*Appeal From Jefferson Circuit Court
Honorable Richard A. Revell, Judge
Action No. 79-CI-01265*

No. 81-CA-537-MR

AND:

MORRIS R. YUDOFKY & ASSOCIATES,

A Kentucky Partnership - - - Appellant

v.

COMMONWEALTH OF KENTUCKY,

DEPARTMENT OF FINANCE - - - Appellee

*Appeal From Jefferson Circuit Court
Honorable Olga S. Peers, Judge
Action No. 79-CI-01270*

AFFIRMING

BEFORE: GANT, GUDGEL and REYNOLDS, Judges.

GANT, JUDGE. This was an action by the Commonwealth of Kentucky, Department of Finance, seeking to acquire property including property of the appellant pursuant to the condemnation statutes, for the purpose of constructing a parking garage in Louisville, to be used in conjunction with the Commonwealth Convention Center and a state office building. Appellants contend that their property is not being taken for public purpose, nor is the area blighted or deteriorated. After a three-day trial, numerous exhibits, exhaustive but not exhausting depositions, the lower court entered its interlocutory judgment herein, granting the Commonwealth its right to immediate possession. This judgment was ruled appealable by the Supreme Court of Kentucky and we turn now to the merits of the case.

The thrust of the argument of the appellant is that the exercise of the power of condemnation in this case was arbitrary and made in bad faith. This is predicated upon an alleged scheme between Al J. Schneider and Honorable Julian Carroll, then governor of the Commonwealth, which scheme appellant contends had the effect of allowing Mr. Schneider to select the site for the proposed garage. The evidence herein discloses that Mr. Schneider was planning to construct an apartment building at the corner of Sixth and Main Streets. Officials of state and local governments had long felt that lack of parking and insufficient hotel rooms were a deterrent to adequate and profitable use of the Convention Center, which was far from a thriving operation. Several meetings were held between the governor, Mr. Schneider, the mayor, various planners and others, to discuss the general plans for and construction in a large area of downtown Louisville. Included in these plans was the construction of a pedway, an enclosed walk-

way, which would connect various buildings and facilities over a large area, extending some five or six blocks in the north and south direction and laterally to other facilities, including the parking garage in this labyrinth. As a result of several discussions, some of which were between the governor and his people and Mr. Schneider, the latter, who operates the Galt House, a large hotel which would be connected by the pedway, agreed to alter his plans to construct an apartment complex at Sixth and Main to construct a hotel at Fourth and Main. This change was made contingent upon a commitment by the state that it would construct its parking garage at Fourth and Market.

After conclusion of the hearing and considerations of the exhibits and evidence previously described, the lower court made its findings of fact, which included:

1. The site selected for the proposed garage, at the northeast corner of Fourth and Market Streets, was not dictated or determined by Mr. Al J. Schneider but was made by the proper state officials in the ordinary course of their duties. Mr. Schneider may have given advice to the Governor or other government officials when so requested but he did not initiate the location for the garage nor was there anything sinister, illegal or improper in the discussion between the Governor and Mr. Schneider, and the state's ultimate determination to construct the parking garage at said site.

2. The site selected for the proposed garage was not made arbitrarily, capriciously, in bad faith, for the direct private gain of any governmental official nor was said site selected by the Commonwealth with a total disregard for all relevant factors.

3. The proposed parking garage will be constructed and operated by the Commonwealth of Kentucky under the auspices of the State Fair Board for the primary

benefit of the Commonwealth Convention Center and amounts to a valid public use.

The Court is bound by the findings of the lower court unless they are clearly erroneous. CR 52.01. *Allen v. Arnett*, Ky., 525 S.W. 2d 748 (1975). After examining the evidence herein and considering the excellent, interesting and entertaining arguments of the appellant, we cannot find that the lower court was clearly erroneous. Consultation between private enterprise and government, to effect a plan for the common good, is not evil, per se, and should be encouraged as long as there is no abuse.

It seems obvious that a parking garage to serve state-owned facilities as well as the general public is, indeed, a public use. *Miller v. City of Georgetown*, Ky., 191 S.W. 2d 403 (1945). Nor is it fatal that some property will benefit more than others. *Sturgill v. Commonwealth, Department of Highways*, Ky., 384 S.W. 2d 89 (1964).

The judgment in 80-CA-230-MR is affirmed. Because of this affirmation and the unpublished opinion of the Supreme Court of Kentucky in this case, the judgment in 81-CA-537-MR is also affirmed.

ALL CONCUR.

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